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YAP BAN LER & ORS.

v.

YAP AH LOOI & YAP OOI KOH & ORS

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

b

[ORIGINATING SUMMONS NO. F 761 OF 1981]

3 MARCH 1986

LAND LAW: *Sale of land - Dispute by beneficiaries of estate - Whether the purchaser had an indefeasible title - Whether exceptions to s. 340, National Land Code applied.*

c

CIVIL PROCEDURE: *Application to strike out originating summons - Whether affidavit admissible.*

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This was an application made pursuant to O. 18 r. 19, Rules of the High Court 1980 and under the inherent power of the Court to strike out the originating summons on the grounds that it disclosed no cause of action. The applicant had purchased a piece of land from the administrators of the estate of which the said land was part of. The respondents were the beneficiaries of the estate and they had instituted the present suit to set aside the sale of the said land to the applicant on the ground that the sale had breached an order of Court. That order of Court was made pursuant to another suit relating to the said estate. The applicant contended that they had an indefeasible title to the land by virtue of s. 340, National Land Code. The respondents contended that the instrument of land was insufficient as the sale price was less than the amount specified in the said order of Court. The administrators of the estate had adjusted the purchase price as part of the land had been acquired by State Government.

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The respondents also contended that the applicant could not rely on their affidavit which was filed in support of the application.

Held:*f*

[1] The applicants were *bona fide* purchasers for the value and they had an indefeasible title in the said land. The consideration for the sale of land was set out in the sale and purchase agreement between the applicants and the administrators of the estate. The respondents had not challenged the said agreement. Section 340(2)(b), National Land Code could not be invoked as it applied to irregularities in the execution of transfer itself.

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[2] In an application to set aside an originating summons, the affidavit in support of the application was treated as part of the pleadings for the purposes of O. 18 r. 19(1)(a) Rules of the High Court 1980. The affidavit in support was admissible.

[Application to set aside originating summons allowed with costs.]

Case referred to:*h*

Re Caines (deceased) Knapman v. Servian & Anor. [1978] 2 All ER 1

Legislation referred to:

National Land Code 1965, s. 340

Probate and Administration Act 1959, s. 60

Rules of the High Court 1980, O. 18 rr. 19, (1) (a)

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For the 2nd defendants/applicants - C. Das; M/s. Shook Lin & Bok
For the 1st, 2nd and 3rd plaintiffs/respondents - C.M. Wong; M/s. Syarikat Ng Kok Thoy
For the 4th plaintiff/respondent - Jennifer Cheong; M/s. Mah Kok & Din

JUDGMENT

Siti Norma Yaakob J:

This is an application under O. 18 r. 19 of the Rules of the High Court and under the inherent powers of the Court made by the 2nd defendants (hereinafter referred to as the applicants), to strike out the originating summons filed by the plaintiffs (hereinafter referred to as the respondents) against them on the ground that the summons discloses no cause of action and therefore untenable in law.

The first objection taken by the respondents was that under O. 18 r. 19(1)(a) of the Rules of the High Court, the applicants cannot rely on their affidavit in support of their application as such affidavit is inadmissible in evidence. The answer to this is that whilst such prohibition has to be strictly complied with in applications to set aside a writ of summons and a statement of claim, there is flexibility in its compliance when it relates to an application to set aside an originating summons where an affidavit is synonymous to a statement of claim and is to be regarded as part of the pleadings for the purpose of O. 18 r. 19(1)(a). See the case of *Re Caines (deceased) Knapman v. Servian & Anor.* [1978] 2 All ER 1. Moreover, in this application the applicants are not proceeding solely under O. 18 r. 19 but also under the inherent jurisdiction of the Court for which affidavit evidence is admissible in support of such application.

To appreciate the nature of the present proceedings, I need to state briefly the background of the different parties to this originating summons. The respondents (plaintiffs in this originating summons) are the children and beneficiaries of Yap Cheng @ Yap Ching (deceased), whose estate is being administered by the first named defendants in this originating summons and who are also the children and beneficiaries of the deceased. Apart from the plaintiffs and the first defendants in the originating summons, the deceased had also other beneficiaries, children born from a second union who are the 3rd to 5th defendants. Dissatisfied with the manner in which the estate was being administered, the 3rd to 5th defendants, instituted legal proceedings in originating summons 203/73 against the plaintiffs and first defendants as administrators praying for an account of the administration of the estate. Originating summons 209/73 was amicably settled and confirmed by an order of Court dated 24 December 1973 wherein part of the settlement provided that one of the landed properties of the deceased namely EMR. No. 5614 for Lot No. 4185 covering an area of 152,460 sq. feet be sold by private treaty at a price of not less than RM6.50 per sq. foot and that the net proceeds of sale be distributed to all the beneficiaries in proportion to their shares that had already been agreed between them.

The land however was not sold for several years as there were no offers at the price fixed by Court. However, in 1977, following an advertisement in the New Straits Times dated 15 May 1977, the applicants (the 2nd defendants in the originating summons), negotiated for the purchase of the land with the first defendants, the administrators of the estate and following the execution of a sale and purchase agreement entered between them on 5 November 1977, the land was transferred and registered in the names of the applicants on 23 December 1977. It is this sale that the respondents have in their originating summons applied to set aside on the following grounds:

- a** 1. The sale had breached the order of Court as the land was sold to the applicants at RM5.90 per sq. foot, well below the permitted unit price of RM6.50 per sq. foot.
2. By giving allowance for the payment of real property gains tax, the net amount for distribution amongst the beneficiaries would definitely be less than the price of the land calculated at RM5.90 per sq. foot.
- b** 3. As there had been a steady increase in the price of immovable property from December 1973 until December 1977 there should have been a variation of the Court order dated 24 December 1973 regarding the unit price of the land so that the beneficiaries can benefit fully from such sale.
4. Section 60 of the Probate and Administration Act 1959 had been contravened.
- c** The applicants in resisting the respondents' contention have now applied to strike out the originating summons on the ground that as the registered proprietors of the land, they are protected by s. 340 of the National Land Code 1965 as they have an indefeasible title to the land.
- d** The only way the respondents can set aside the sale of the land to the applicants is to bring themselves within any of the exceptions to s. 340 of the National Land Code. They are not alleging fraud or misrepresentation in the transaction but rely instead of the insufficiency of the instrument of transfer under s. 340(2)(b) of the National Land Code as the consideration stated in Form 14A is RM900,000 which when calculated, gives the purchase price of the land at RM5.90 per sq. foot and clearly has contravened the unit price of RM6.50 per sq. foot as ordered by Court.
- e** A perusal of Form 14A does show the purchase price of the land at RM900,000 but it must be remembered that the applicants did not derive their interest on the land solely on Form 14A but also from another instrument namely the sale and purchase agreement dated 5 November 1977, entered into with the administrators of the estate. This agreement which is in no way challenged, clearly spells out the intention of the parties and the terms and conditions of sale. Looking at para. 3 to 5 of the preamble to the agreement, the administrators
- f** are clearly aware that the land was to be sold at the unit price fixed by the Court, i.e. not less than RM6.50 per sq. foot which works out to a total of RM990,990. They have also declared that they were aware that part of the land was required by Dewan Bandaraya for the construction of a public road and presumably considering that the applicants would get less than what they would be paying for, they were agreeable to make the necessary adjustment in the purchase price by reducing a sum of RM90,990 from the purchase price so
- g** as to compensate the applicants for the surrender of part of the land to Dewan Bandaraya. It was by such an adjustment that the purchase price was reduced to RM900,000 the amount that was stated in the instrument of transfer.
- h** It is not disputed that as early as August 1974, there was already in existence a Master Plan by Dewan Bandaraya relating to the development of land in the Segambut area which affected Lot 4185 requiring the surrender of the frontage land for road widening purposes and the surrender of an unspecified area of the land for further road construction across the land. The administrators were very much aware of this as they had stated so in the preamble to the sale and purchase agreement. Admittedly, the area of the surrender is not specified in the agreement, neither can it be ascertained how the adjustment of RM90,990 representing the value of land to be surrendered was arrived at. This, to me, is quite immaterial as what is more important is that the adjustment was made with the concurrence of the administrators.
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If the respondents now feel that such adjustment should not have been considered at all, or that the amount of adjustment was excessive, their only remedy is against the administrators personally and not against the applicants, the *bona fide* purchasers for value. The insufficiency in the instrument of the transfer that is relied upon by the respondents can only relate to the formalities of the transfer itself like the incapacities of the parties executing the instrument of transfer as when one party is found to be a minor or where the instrument of transfer is executed under an invalid power of attorney or that it does not conform with the relevant statutory requirements. The insufficiency must relate to irregularities in the execution of the transfer itself. It has no bearing on the amount of consideration stated in the transfer, especially so when such consideration as in the present case had been agreed upon on terms and conditions as contained in the sale and purchase agreement which as I have already stated before is in no way challenged by the respondents.

Thus, it will appear that there is no merits to the respondents' contention that the land was sold for less than RM6.50. The same also applies to the respondents' complaint that the net profit of sale will be greatly reduced by payment of real property gains tax as that is of no concern of the applicants. Again, the respondents' remedy is against the administrators of the estate personally and not against the applicants. Likewise, as the respondents have alleged that the administrators had been negligent in not getting the Court order varied to represent the true market price of the land, their cause of action also lies against the administrators and not against the applicants directly. In this respect too, I do not consider that the applicants derive any advantage by the surrender of the land as this is not an acquisition for which compensation is payable but is the surrender of land under s. 200 of the National Land Code for which no compensation is payable. As for reliance to s. 60 of the Probate and Administration Act 1959, the right of action arising under that section is only against the administrators of the estate and not against third parties who have acquired titles as the *bona fide* purchasers for value. As it is clear from the pleadings, that the applicants had derived an indefeasible title to the land, I allowed their application to set aside this originating summons with costs.

Also found at [1988] 1 CLJ 845

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